MBf Finance Bhd v Cahaya Luas Sdn Bhd & Ors

HIGH COURT (IPOH) — CIVIL SUIT NO 22–241 OF 1999
SU GEOK YIAM JC
14 JUNE 2001

Hire Purchase *— Breach of agreement — Default in payment of instalments — Whether hire purchase agreement was genuine — No unequivocal act to indicate termination of agreement — Whether plaintiff entitled to total balance due*

The plaintiff entered into a hire purchase agreement with the first defendants whereby the plaintiff rented to the first defendants machinery. The second to the sixth defendants were the guarantors for the first defendants. The plaintiff commenced an action against the defendants for defaulting payment under the hire purchase agreement. The plaintiff applied for a summary judgment against the defendants which was allowed by the deputy registrar. The defendants appealed. It was submitted that there were triable issues as follows: (i) the hire purchase agreement was not a genuine hire purchase agreement because the ownership of the machinery had already vested in the first defendants before the execution of the hire purchase agreement; and (ii) even assuming the hire purchase agreement was genuine, it was still subsisting as it had not been terminated before the writ action was filed.

Held, allowing the appeal:

(1) The two documents relied upon by the plaintiff as showing of its ownership of the machinery would appear to suggest that the first defendants and not the plaintiff were the owners of the machinery before the execution of the hire purchase agreement because in the first document (the invoice), the name of the consignee was the first defendants and the terms of payment were clearly set out. The plaintiff's name appeared nowhere in the invoice. The invoice also suggested that the only parties to the importation of the machinery were the first defendants and the dealer. As for the loan discharge advice, again the name of the first defendants appeared. Although the name of the plaintiff also appeared, this did not indicate conclusively that title in the said machinery had vested in the plaintiff at that stage (see p 560D–F).

(2) The hire purchase agreement was dated the same date as the loan discharge advice. This could suggest that the ownership in the machinery had passed to the first defendants from the dealer before the execution of the hire purchase agreement. There was therefore a triable issue which certainly merits a full trial. This issue could only be determined at the trial upon hearing evidence from the witnesses of both sides. If the hire purchase agreement was merely a disguise for a loan transaction then it was invalid (see pp 560G–H, 561I–562A).

(3) The plaintiff must do an unequivocal act to indicate to the first defendants that the plaintiff was terminating the hire purchase agreement. The facts relied upon by the plaintiff in its affidavits did not show plainly and obviously that the plaintiff had in fact terminated the hire purchase agreement before the filing of the writ action. The plaintiff did not repossess the machinery. Thus, the hire purchase agreement was still valid and subsisting. The plaintiff was not entitled to the total balance due. The plaintiff was only entitled to the arrears of rental instalments. But there was no such claim in the writ action. This also disclosed a triable issue which merits a trial (see p 564F–I).

[Bahasa Malaysia summary

Plaintif telah mengikat suatu perjanjian sewa beli dengan defendan pertama yang mana plaintif telah menyewa mesin kepada defendan pertama. Defendan kedua hingga keenam merupakan penggerenti defendan pertama. Plaintif memulakan satu tindakan terhadap defendan-defendan kerana mengingkar bayaran di bawah perjanjian sewa beli. Plaintif memohon penghakiman terus terhadap defendan-defendan yang dibenarkan oleh timbalan pendaftar. Defendan-defendan merayu. Adalah dihujahkan bahawa wujudnya isu-isu yang boleh dibicarakan seperti yang berikut: (i) perjanjian sewa beli tersebut bukanlah suatu perjanjian sewa beli yang sah kerana pemilikan mesin tersebut telah pun diletakhak dalam defendan pertama sebelum perlaksanaan perjanjian sewa beli tersebut; dan (ii) biarpun mengandaikan perjanjian sewa beli tersebut adalah sah, ia masih wujud kerana ia belum ditamatkan sebelum tindakan writ difailkan.

Diputuskan, membenarkan rayuan tersebut:

(1) Dua dokumen yang diharapkan oleh plaintif sebagai menunjukkan bukti atas milikannya ke atas mesin tersebut seolah-olah mencadangkan bahawa defendan-defendan pertama dan bukannya plaintif merupakan pemilik mesin tersebut sebelum perlaksanaan perjanjian sewa beli tersebut kerana dalam dokumen pertama (invois tersebut), nama penerima adalah defendan-defendan pertama dan terma bayaran dinyatakan dengan jelas. Nama plaintif tidak menonjol pada invois. Invois tersebut juga mencadangkan bahawa pihak-pihak kepada pengimportan mesin tersebut cumalah defendan-defendan pertama dan peniaga tersebut. Mengenai pemberitahuan rasmi discaj pinjaman tersebut, sekali lagi nama defendan-defendan pertama menonjol. Walaupun nama plaintif juga muncul, ini tidak menunjukkan dengan meyakinkan bahawa hakmilik dalam mesin tersebut terletakhak dalam plaintif di peringkat itu (lihat ms 560D–F).

(2) Perjanjian sewa beli tersebut membawa tarikh yang sama dengan tarikh pada pemberitahuan rasmi discaj pinjaman. Ini mungkin mencadangkan bahawa milikan dalam mesin tersebut telah beralih kepada defendan-defendan pertama daripada peniaga sebelum perlaksanaan perjanjian sewa beli tersebut. Maka terdapat satu isu yang boleh dibicarakan yang sememangnya mewajarkan perbicaraan penuh. Isu ini hanya boleh ditentukan di perbicaraan setelah mendengar keterangan dari saksi-saksi kedua belah pihak. Andainya perjanjian sewa beli tersebut cuma merupakan satu samaran untuk transaksi pinjaman, maka ia tidak sah (lihat ms 560G–H, 561I–562A).

(3) Plaintif mesti melakukan sesuatu yang jelas untuk menunjukkan kepada defendan pertama bahawa plaintif telah menamatkan perjanjian sewa beli tersebut. Fakta-fakta yang diharapkan oleh plaintif dalam afidavitnya tidak menunjukkan secara jelas dan nyata bahawa plaintif sebenarnya telah menamatkan perjanjian sewa beli tersebut sebelum pemfailan tindakan writ tersebut. Plaintif tidak mengambil balik milik mesin tersebut. Justeru itu, perjanjian sewa beli tersebut masih sah dan mengikat. Plaintif tidak berhak mendapat jumlah baki yang harus dibayar. Plaintif hanya berhak menerima tunggakan sewa ansuran. Tetapi tidak terdapat tuntutan sedemikian dalam tindakan writ tersebut. Ini juga mendedahkan satu isu yang boleh dibicarakan yang mewajarkan perbicaraan (lihat ms 564F–I).]

Notes

For cases on default in payment of instalments, see 7 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3416–3421.

Cases referred to

Abdul Rahim bin Abdul Hamid & Ors v Perdana Merchant Bhd & Ors [2000] 2 MLJ 417 (refd)

Anglo-American Corp Ltd v Goodwood Sawmill Co [1966] 1 MLJ 263 (refd)

BSNC Leasing Sdn Bhd v Sabah Shipyard Sdn Bhd & Ors [2000] 2 MLJ 70 (refd)

Gooi Seang Tuck v Tan Peng Loon [1959] MLJ 153 (refd)

Leong Weng Choon v Consolidated Leasing (M) Sdn Bhd [1998] 3 MLJ 860 (refd)

Hagemeyer Trading Co (Malaysia) Sdn Bhd v Gibson Trading Co & Anor [1978] 2 MLJ 101 (refd)

Low Ping Ming v MBf Finance Bhd [2000] 2 CLJ 307 (refd)

Legislation referred to

Companies Act 1965 s 108
Rules of the High Court 1980 O 14, O 16

Contracts Act 1950 ss 40, 76
Hire Purchase Act ss 15, 16

Zaizuraimy Abd Rahim (*Wong Hau Yik & Co*) for the appellant.
Saranjit Singh (*Adliza Subra & Partners*) for the respondent.

Su Geok Yiam JC:. This is an appeal against my decision allowing the defendant's appeal (encl 26) against the order of the learned deputy registrar dated 25 September 2000 allowing the plaintiff's application (encl 9) for summary judgment to be entered against the defendants.

Facts and chronology

On 2 May 1996, the plaintiff, a licensed finance company incorporated in Malaysia under Companies Act 1965 ('the Act'), entered into a hire purchase agreement with the first defendants, a private limited company, also incorporated in Malaysia under the Act. Pursuant to the said hire purchase agreement bearing no 2–0810–720125–6 ('the said hire purchase agreement'), the plaintiff rented to the first defendants one unit of new 'SCHLICK roller conveyer shot blast plant type ROTOJET RB 1500/7.5 and eight ('the said machinery') for a total sum of RM738,562.75.

The second, third, fourth, fifth and sixth defendants are the alleged guarantors for the first defendants.

The first defendants having defaulted on payment, the plaintiff sent a notice of demand dated 17 June 1999 to all the defendants through its solicitors, Tetuan Adliza Subra & Partners, claiming a sum of RM239,112.78 together with interest on the principal sum with effect from 17 June 1999.

The defendants, having failed to comply with the notice of demand, the plaintiff commenced this writ action on 23 July 1999 against all the defendants, claiming a sum of RM310,199.98 together with interest at 12% per sum with effect from 5 July 1998, until the date of full settlement and costs.

On 25 August 1999, the defendants entered their appearance. This was followed by their statement of defence (encl 4) which was filed on 8 September 1999. On the same date, the defendant also took out a third party notice against one Nipponalloy Corporation (M) Sdn Bhd pursuant to O 16 of the Rules of the High Court 1980 ('the RHC').

The defendant's statement of defence

In their statement of defence, the second to the sixth defendants denied they were the guarantors of the first defendants. The defendants also contended as follows:

(1) the first defendants had assets and did not require any guarantor;
(2) the defendants were never given a copy of the said hire purchase agreement;
(3) the amount claimed, ie RM310,199.98, is excessive and incorrect;

(4) the said machinery had already been taken over by a third party, Nipponalloy Corporation (M) Sdn Bhd, with the knowledge of the plaintiff; and

(5) the defendants did not receive the notice of demand.

The third party notice, having been duly served, the third party entered its appearance on 21 September 1999.

The plaintiff's application for summary judgment

On 27 January 2000, the plaintiff applied vide their summons in chambers (encl 9) for summary judgment against the defendants pursuant to O 14 of the RHC on the following grounds:

(a) that the first defendants was in breach of the said hire-purchase agreement in failing to pay the monthly rental instalments;

(b) that the second, third, fourth, fifth & sixth defendants were in breach of their contract of guarantee in failing to make payment upon the failure of the first defendats to pay the monthly instalments pursuant to the said hire purchase agreement; and

(c) that the defendants had no defence to the plaintiffs' cause of action.

On 25 September 2000, the learned deputy registrar allowed summary judgment to be entered against the defendants.

Dissatisfied with the decision, the defendants appealed vide (encl 26) to the judge in chambers.

The defendants' appeal to the judge in chambers

When the appeal first came up for hearing, Mr Saranjit Singh, the learned counsel for the plaintiff, put fourth a preliminary objection. He contended that the notice of appeal was defective as it was served out of time. Further, there was no application by the defendants for an extension of time to serve the notice of appeal out of time.

In support thereof, he cited the cases of *Gooi Seang Tuck v Tan Peng Loon* [1959] MLJ 153 and *Hagemeyer Trading Co (Malaysia) Sdn Bhd v Gibson Trading Co & Anor* [1978] 2 MLJ 101 at p 104.

No prior notice of the preliminary objection having been given to En Zaizuraimy, the learned defendants' counsel, and there being no objection by the learned plaintiff's counsel who was gracious enough to apologize to the court for not giving prior notice to his learned opponent, the court allowed En Zaizuraimy's application for a postponement to respond to the preliminary objection.

On the next date when the case came up for continued hearing, the learned defendants' counsel prayed for the preliminary objection to be dismissed on the ground that the delay of two weeks was caused by the delay on the part of the court in not issuing the notice of appeal within the prescribed time, and there was no prejudice to the plaintiffs if the court were

to proceed with the hearing of the appeal. The learned plaintiff's counsel conceded that the notice of appeal which should have been issued by the court within five days had not been so issued, and he was content to leave his submissions at that.

In view of the concession of the learned plaintiff's counsel, the court proceeded to dismiss the preliminary objection.

The court having dismissed the plaintiff's preliminary objection, the learned defendants' counsel tendered his written submission and his bundle of authorities in support of his contention that there are two triable issues and that the learned deputy registrar had erred when ordering summary judgment to be entered in favour of the plaintiff instead of dismissing the plaintiff's application and setting down the case for trial.

Whether any triable issues

The court has to determine whether the following two issues which were raised by the defence are triable issues:

(1) the said hire purchase agreement is not a genuine hire purchase agreement because the ownership of the said machinery had already vested in the first defendants before the execution of the said hire purchase agreement; and

(2) even assuming the said hire purchase agreement is a genuine one, it is still subsisting as it had not been terminated before the writ action was filed.

The plaintiff and defendants have filed a total of seven and four affidavits, respectively.

In its supporting affidavit (encl 10), the plaintiff has relied on the said hire purchase agreement dated 2 May 1996 (exh 'KTS-1'), the letter of guarantee dated 2 May 1996, (exh 'KTS-2') a copy of the invoice for the SCHLICK ROTOJET plant (exh 'KTS-3'), the notice of repossesion dated 10 April 1998 (exh 'KTS-4'), the letter of demand dated 17 June 1999 sent by its solicitors, Tetuan Adliza Subra & Partners to the defendants (exh 'KTS-5') and the statement of accounts showing the sum of RM310,199.98 as the sum owing as at 4 July 1999 (exh 'KTS-6').

In its affidavit in reply affirmed on 8 March 2000 by the 6th defendant, a director of the first defendant, filed on 8 March 2000 (encl 11) opposing the plaintiff's application for summary judgment, the defendants had raised the following issues:

(1) the plaintiff's application was frivolous, vexatious and an abuse of the process of the court because it was filed after the defendants had filed their statement of defence;

(2) the said hire purchase agreement was not signed by the first defendants as alleged by the plaintiff. Neither did it bear the common seal of the first defendants nor was there any detail about the identity of the signatory;

(3) further or in the alternative, the validity of the said hire purchase agreement is disputed because the third page clearly showed that there was no 'dealer';

(4) pursuant to the said hire purchase agreement if the first defendants failed to pay any of the rental instalments or breached any of the terms of the said hire purchase agreement, the plaintiff was only entitled to terminate the said hire purchase agreement by giving prior notice in writing, although there are words to the effect that no notice is required;

(5) the said machinery was not the property of the plaintiff and in the event of any breach by the first defendants in the payment of the rental installments, the plaintiff was not entitled to terminate the said hire purchase agreement nor to claim the balance of the rental, including loss of profits;

(6) the letter of guarantee (exh 'KTS-2') is invalid because it was completed in a confusing manner as it gave the impression that the third defendant had given two guarantees on the same date;

(7) the copy of the invoice for the SCHLICK ROTOJET Plant (exh 'KTS-3') shows that the said machinery was owned by the first defendants as early as March 1996; and

(8) the alleged statement of account (exh 'KTS-6') does not contain any statement of account, nor does it show how it was prepared nor who prepared it.

The plaintiff, in its first affidavit in reply filed on 29 May 2000 (encl 12) affirmed by its officer, Starry Doong Sing Kaung on 26 May 2000, stated in para 4, that the third and sixth defendants had signed the said hire purchase agreement on behalf of the first defendants, in front of him.

In para 5, he explained that the said machinery had been imported from abroad under the name of the first defendants and consequently, the name of the dealer was not stated in the said hire purchase agreement (exh 'KTS-1').

The deponent, Starry Doong, also denied that there was confusion in the letter of guarantee (exh 'KTS-2') and clarified that the third and sixth defendants had filled in the letter of guarantee twice because on the first occasion they had signed as guarantors and on the second occasion they had signed as representatives of the first defendants, being the directors of the first defendants. There was another affidavit in reply (encl 13) which was affirmed by Koh Tian Sek, the branch manager of the plaintiff, who in para 12, also explained that the said machinery was imported by the plaintiff and rented out to the first defendants.

In response to the two affidavits in reply of the plaintiff, vide its affidavit filed on 7 July 2000 (encl 17) the defendants denied that Starry Doong had witnessed their signatures. They relied on the endorsement 'Blank, confirmed with Mr Lim Fook Meng 13 May 1996' to show that the said hire purchase agreement could not have been signed on 2 May 2000 since this portion was left blank right until 13 May 1999.

The defendants insisted that the first defendant had bought the said machinery as is reflected in the invoice (exh 'KTS-3'). A

The defendants reiterated that the letter of guarantee (exh 'KTS-2') was signed in blank, and at the time of signing it was confusing.

The plaintiff in its second affidavit in reply affirmed on 21 July 2000 by Starry Doong, and filed on 21 July 2000 (encl 18) said that Starry Doong had explained the contents of the said hire purchase agreement in English to the third and sixth defendants before they signed it. He reiterated that since the said machinery had been imported from the dealer overseas by the plaintiff, the portion concerning the dealer was left blank in the said hire purchase agreement. He maintained that 2 May 1996 was the correct date of the signing of the said hire purchase agreement. B C

In para 7, he stated that the plaintiff had made full payment to the dealer and that the said machinery was sent to Malaysia under the name of the first defendants. He exhibited a copy of the loan discharge advice and the letter to OUB (exh 'SDSK-I') to support this.

It is pertinent, at this juncture, to note that no explanation was given as to why the said machinery was sent to Malaysia under the name of the first defendants instead of under the name of the plaintiff if it was indeed true, that it was the plaintiff who had purchased the said machinery from the overseas dealer. D

The plaintiff relied on the payment by the first defendants on the deposit of RM126.922.62, and also the monthly instalments for a period of there years, and the request by the defendants for an extension of the said hire purchase agreement as evidence that the defendants had agreed to its terms. The plaintiff also exhibited the plaintiff's offer to the first defendants which bore the signatures of two directors and the correspondences between the plaintiff and the first defendants concerning the extension of the hire purchase facility, collectively, as exh 'SDSK-2'. E F

In conclusion, Starry Doong again reiterated that all the particulars in the said hire purchase agreement and the guarantee had been filled in before the two documents were signed by the defendants.

Filed together with Starry Doong's affidavit was also an affidavit in reply by Koh Tian Sek, also on behalf of the plaintiffs (encl 19). He reiterated in para 5 that the said machinery had been bought by the plaintiff for rental to the first defendants, and that the said hire purchase agreement had been signed by the third and sixth defendants on behalf of the first defendants, and in para 9, that the defendants were educated people and could have objected if the particulars of the said hire purchase agreement had not been filled in at the time of signing. G H

In para 10, he denied that the statement of account did not show how the amount owing had been derived at nor the person who had confirmed the correctness of the amount.

He went on to exhibit as 'KTS-1' an undated certificate of indebtedness signed by him confirming the amount due from the defendants as I

RM310,199.99 as at 4 July 1999 together with interest until date of full settlement and costs.

Since there were clearly disputed issues of fact as was borne out by the conflicting affidavits and there was also a new matter put in, ie the certificate of indebtedness, it was not surprising, therefore, that the defendants responded to the plaintiff's second set of affidavits in reply (encll 18 and 19) by filing their second affidavit in reply (encl 20) on 2 August 2000.

Apart from denials, there were two assertions. In para 5, Chan Har @ Chen Fook Khim, the sixth defendant, who affirmed the affidavit for all the other five defendants, contended that the certificate of indebtedness was incorrect in view of the plaintiff's failure to terminate the said hire purchase agreement because no one knows which date should be taken as the effective date for the calculation of the amount due and owing by the defendants.

In para 9, he raised a new issue, ie that the guarantee was not valid because it failed to give an option to the guarantors to continue with the said hire purchase agreement in the event of a default by the first defendants.

The learned deputy registrar considered a total of nine issues which had been raised by the defendants in their statement of defence and affidavits in reply before ruling that there were no triable issues which merited a full trial.

The nine issues are as follows:

(1) the said hire purchase agreement was not signed by the first defendants and there was no common seal or particulars of the signatory;

(2) there was no signature in the space reserved for 'dealer' in p 3 of the said hire purchase agreement;

(3) the letter of guarantee is invalid because the third defendant gave two guarantees on the same date;

(4) the statement of account is baseless because it did not state who prepared it and how it was prepared;

(5) the defendants were not given a copy of the said hire purchase agreement;

(6) the sum claimed by the plaintiff is incorrect and excessive;

(7) the said machinery has already been taken possession of by Nipponalloy Corporation (M) Sdn Bhd, the third party in this case;

(8) the said machinery was bought by the first defendants and was owned by the first defendants and not the plaintiff before the execution of the said hire purchase agreement; and

(9) the plaintiff is not entitled to claim the whole sum as they did not terminate the said hire purchase agreement.

In the appeal before me, the defendants are relying only on the last two grounds, ie grounds (8) and (9). In view of that, I shall deal only with those two grounds.

The court is mindful of the principles governing summary judgment under O 14 of the RHC and the numerous decided cases. In this appeal, suffice for me to refer to just one.

In *Abdul Rahim bin Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors* [2000] 2 MLJ 417, his Lordship Mokhtar Sidin JCA in delivering the judgment of the Court of Appeal had this to say at p 428:

> In a nutshell, in an application under O 14 made by the plaintiff for summary judgment without trial, the general principles established are that the plaintiff has to satisfy the court that the defendant plainly and obviously has no defence to the plaintiff's claim or part of the plaintiff's claim. If the plaintiff is able to satisfy the court, then summary judgment should be entered in the plaintiff's favour. On the other hand, if the defendant can show that there is a serious conflict of material facts as disclosed in the opposing affidavits, or there is otherwise a triable issue worthy of judicial investigation in the trial of the action, or there is an important and difficult point of law requiring further and mature consideration at the trial, summary judgment should be refused.

First ground: Ownership of the said machinery

Having considered the submissions of the learned defendants' counsel, the court is satisfied that the two documents relied upon by the plaintiff as showing proof of their ownership of the said machinery before the execution of the said hire purchase agreement would appear to suggest the reverse, ie that the first defendants and not the plaintiff were the owners of the said machinery before the execution of the said hire purchase agreement. This is because in the first document, ie the invoice (exh KTS-3, encl 10), the name of the consignee is the first defendants' and the terms of payment are clearly set out. The plaintiff's name appears nowhere in the invoice. The invoice which is dated 21 March 1996 also suggests that the only parties to the importation of the said machinery were the first defendants and the dealer in Germany.

As for the loan discharge advice dated 2 May 1996 (exh 'SDSK-1', encl 18), again the name of the first defendants appear. Although the name of the plaintiffs also appear this does not indicate conclusively that title in the said machinery had vested in the plaintiffs at that stage.

The said hire purchase agreement is also dated the same date as the loan discharge advice, ie 1 May 1996. In my view this could suggest that the ownership in the said machinery had passed to the first defendants from the dealer in Germany before the execution of the said hire purchase agreement.

This could explain why the relevant part of the said hire purchase agreement pertaining to 'dealer' was left blank in the said hire purchase agreement. There is, therefore, a triable issue which certainly merits a full trial.

In *Low Ping Ming v MBf Finance Bhd* [2000] 2 CLJ 307, Steve Shim J (as his Lordship then was) had found that at the material time of the transaction between the plaintiffs and the dealer of the machinery the defendant was a stranger because the hire purchase agreement was entered

into subsequent to the said transaction. His Lordship also found that at the time of the execution of the hire purchase agreement, the title to the machinery (and hence the ownership) was already vested in the plaintiff as it had made an initial part payment of the purchase price to the dealer and had taken delivery of the machinery. His Lordship then went on to declare that the subsequent hire purchase agreement entered into between the plaintiff and the defendant was invalid because it was not a true hire purchase agreement and the defendant's repossession of the machinery was also invalid as it was based upon an invalid hire purchase agreement.

The above case illustrates the importance of the plaintiff in the present case having title in the said machinery prior to the execution of the said hire purchase agreement with the first defendants. If the ownership of the said machinery was already vested in the defendants prior to such execution, the true effect of the transaction between the plaintiff and the first defendants may not be a valid hire purchase agreement. It could be a loan transaction or some other transaction.

In *BSNC Leasing Sdn Bhd v Sabah Shipyard Sdn Bhd & Ors* [2000] 2 MLJ 70, the first issue which came up for the determination of the Court of Appeal was as follows (at p 79):

> The first issue: Passing of property
> To succeed in its application for repossession, BSNC leasing had to demonstrate that the property in the turbine had passed to it before it entered into the hire purchase agreement with Sabah Shipyard. Only on that basis could it be argued with any conviction that there was a genuine hire purchase transaction.
>
> In the court below, Sabah Shipyard argued that the property irr the turbine had always remained with it and had never passed to BSNC Leasing. It was contended that the so-called hire purchase agreement was a sham; a device to cloak the real transaction, which was one of loan upon the security of the turbine. It was also submitted that the hire purchase agreement was in truth an unregistered bill of sale that was void against Sabah Shipyard by reason of the provisions of s 108 of the Companies Act 1965.

At p 83, the Court of Appeal decided the first issue as follows:

> … if one were to go behind the principal document one would discover not a shred of evidence to show that the turbine in question had been sold to BSNC Leasing at any point in time before the execution of the hire purchase agreement. Yet the hire purchase agreement refers to BSNC Leasing as owner of the turbine which is plainly not the truth. … the fair inference to be drawn from the totality of the evidence is that Sabah Shipyard owed Wing Teik RM29m and the hire purchase agreement was used as a device to cloak the real transaction which was a loan upon the security of goods. In short, the hire purchase agreement was an unregistered bill of sale. Not being in the statutory form, it was non registrable and was therefore void. Accordingly, the learned judge was entirely correct in dismissing BSNC Leasing's summons for leave to repossess the turbine.

Applying that case to the facts of the present case, I am of the view that the first issue can only be determined at the trial upon hearing evidence from

the witnesses of both sides. If the said hire purchase agreement was merely a disguise for a loan transaction then it is invalid.

It is noteworthy that the plaintiff has not taken any steps to repossess the said machinery other than to send a notice of intended repossession giving rise to the impression that the transaction may not be a genuine hire purchase transaction.

Second ground: Termination of the hire purchase agreement

Assuming the court is wrong on the first ground and the said hire purchase agreement is a genuine and valid hire purchase agreement, the court shall proceed to deal with the second ground of appeal, ie whether the said hire purchase agreement had been duly terminated before the filing of this writ action. It is not in dispute that no notice of termination was ever given to the defendants before the plaintiff instituted the writ action.

It is also not in dispute that cl 5(f) of said hire purchase agreement has provided as follows:

> If the hirer shall:
>
> (a) *make default in punctually paying the initial payment of any of the hire rentals or any other sums payable under the Agreement (whether demanded or not); or*
>
> (b) …
>
> (c) …
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> (d) …
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> (e) …
>
> (f) …
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> *then it shall be lawful for the owner* (but without prejudice to the owner) *without notice to terminate this hiring*, or by written notice sent (by post or otherwise) to or leave at the hirer's last known address forthwith to determine this hiring, and the owner's consent to the hirer's possession of the said goods shall be deemed to be withdrawn, and the hirer shall forthwith at the hirer's expense, deliver up the said goods to the owner and the owner and its servants or agents shall be entitled without any notice to enter upon any premises where the said goods may be and seized and taken possession thereof, and to recover all charges, costs and expenses incurred in connection therewith. (Emphasis added.)

Despite this provision, the defendants contend that a notice of termination is required before the plaintiff can terminate the said hire purchase agreement. Otherwise, the said hire purchase agreement is still valid and subsisting and the plaintiff can only claim for the arrears of rental instalments but not for the total balance.

The court is in agreement with the defendants' contention. This is borne out in the two cases cited below. In the first case of *Anglo-American Corp Ltd v Goodwood Sawmill Co* [1966] 1 MLJ 263, there was a clause in the hire purchase agreement concerning a tractor which provided as follows:

> *If the hirer shall not duly pay to the owners any of the sums herein provided to be paid … then the owners* shall forthwith become entitled to immediate

> possession of the property and *may in every such case*: (a) without prejudice to any claim for arrears of hire, rent or damages for breach of this agreement forthwith and *without notice* or demand *terminate the hiring* and retaking possession of the property; and/or (b) by written notice either served personally on the hirer or sent by post or otherwise to the hirer or to his last known address forthwith for all purposes absolutely determine and end this agreement and the hiring hereby constituted and thereupon the hirer shall no longer be in possession of the property with the owners' consent nor shall either party thereafter have any rights under this agreement, but such determination shall not discharge any pre-existing liability of the hirer to the owners. (Emphasis added.)

The defendants defaulted on payment of the instalments amounting to RM10,381.43. The plaintiff repossessed the tractor and sued the defendants for certain sums of money to which they alleged they became entitled on their terminating the hiring by reason of the defendants' default. The defendants contended that the plaintiff committed a breach of the agreement by taking possession of the tractor without prior notice terminating the hire purchase agreement.

In dismissing the defendants' contention and in allowing the plaintiff's claim, Gill J (as his Lordship then was) had this to say at p 264, para F, right hand column onwards until para I:

> Under the agreement here the owners became entitled to immediate possession on the default by the hirer to pay the hire-rents on the due dates, where upon they were at liberty 'forthwith and without notice or demand (to) terminate the hiring and retake possession'. As stated in the same footnote on *Goode on Hire-Purchase* starting at p 98:
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> > '*Where notice of termination is not required by the agreement, all that is necessary to bring the agreement to an end is some unequivocal act by the owner indicating his intention to treat the agreement as terminated. Repossession of the goods will normally suffice for this purpose*.'
>
> *Goode on Hire-Purchase* in the text at the same page says:
>
> > 'A provision that in certain events the owner should have power to declare the hiring terminated' implies that notice is to be given to the hirer or some other act done which is equivalent to a declaration to the hirer that the owner regards the agreement as at an end. It is otherwise, however, if the agreement states merely that the owner 'may terminate the hiring'. (Emphasis added.)

In the second case of *Leong Weng Choon v Consolidated Leasing (M) Sdn Bhd* [1998] 3 MLJ 860, the Court of Appeal held that the default of a hirer in the payment of the monthly instalments under a hire purchase agreement does not amount to a termination of the agreement because the owner has the option to terminate or carry on with the agreement despite the hirer's default.

His Lordship NH Chan JCA, in delivering the judgment of the court said as follows, at p 863:

> Even if the first defendant had repudiated (that is to say 'refused to perform' the agreement 'in its entirety' by refusing to pay at all any further rental instalments, (as a matter of contract law) that would not have terminated the agreement. In this case it is only the plaintiff who has the right to terminate

the agreement. Put in another way, the plaintiff could elect to treat the contract as at an end by accepting the repudiation and terminating the contract. See s 40 of the Contracts Act 1950 which reads:

> 'When a party to a contract has refused to perform, or disabled himself from performing, *his promise in its entirely*, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.' (Emphasis added.)

as follows, at p 863:

> In the present case, the first defendant had disabled itself from performing its agreement in its entirety by losing the bus to the authorities. Even this fact would not mean that the first defendant had terminated the hire purchase agreement. Section 40 of the Contracts Act gives to the plaintiff (that is, the promisee) the right to elect to terminate the agreement and recover damages under s 76 of the Act or to treat the agreement as alive and continuing.
>
> In other words, the plaintiff could either accept the repudiation by terminating the agreement or he could ignore the breach by treating the contract as alive and subsisting. As a matter of fact as well as on the pleadings the plaintiff did not terminate the contract despite the repudiation by the first defendant so that the contract is still subsisting

and as follows at p 865:

> In the present case, as the hire purchase agreement was still subsisting since the plaintiff did not determine it (under s 40 of the Contracts Act) or repossess the bus (under s 16 of the Hire Purchase Act) nor did the first defendant return it to the plaintiff (under s 15 of the same Act), the plaintiff still has the right to recover instalments due under the agreement. Unfortunately for the plaintiff, there was no claim for arrears of instalments in its statement of claim. Therefore, as the plaintiff did not claim for arrears of instalments against the first defendant, there was no liability of the first defendant (hirer) for the appellant (guarantor) to make good under the terms of his guarantee.

Applying the principles of law in these two cases to the facts of the instant case, the court is of the view that the plaintiff must do an unequivocal act to indicate to the first defendants that the plaintiff is terminating the said hire purchase agreement although the words used in cl 5 of the said hire purchase agreement are to the effect that the plaintiff is entitled to terminate the agreement without notice upon the first defendant's default in the payment of the monthly rental instalments. Unfortunately for the plaintiff, the facts relied upon by the plaintiff in their affidavits do not show plainly and obviously that the plaintiff has in fact terminated the said hire purchase agreement before the filing of this writ action. The plaintiff did not repossess the said machinery or do some other unequivocal act to signify to the first defendant that it was putting an end to the said hire purchase agreement. Thus the said hire purchase agreement is still valid and subsisting. The plaintiff is not entitled to the total balance due. The plaintiff is only entitled to the arears of rental instalments. But there was no such claim in the writ action.

A fortiori, the second ground of appeal also discloses a triable issue which merits a trial.

A As the court was satisfied that the summary judgment procedure in O 14 of the RHC was inappropriate for the determination of the plaintiff's claim in view of the two arguable defences raised by the defendants, the court allowed the defendants' appeal with costs.

Appeal allowed.

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Reported by Jafisah Jaafar

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